Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

International Brotherhood of
Electrical Workers, Local 84
Petitioner,

V.

Georgia Power Company
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

I. Whether a court should vacate an award of damages by a labor arbitrator which it considers to be punitive if the labor agreement does not specifically authorize the awardance of punitive damages or whether the court should enforce such an award unless punitive damages are specifically prohibited by the agreement?

II. Whether, in an action to vacate an award by a labor arbitrator, a party may assert a defense that was either not raised or was abandoned by that party in the proceeding before the arbitrator?

III. Whether, a court may vacate an award by a labor arbitrator because the court concludes the arbitrator made a mistake of law?

PARTIES

The Petitioner and Respondent were the only parties listed in the caption of the case in the United States Court of Appeals for the Eleventh Circuit or in the United States District Court for the Northern District of Georgia.

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International Brotherhood of
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PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, International Brotherhood of Electrical Workers, Local No. 84 (hereinafter "Local 84"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Georgia Power Co.* v. *International Brotherhood of Electrical Workers, Local No. 84*, 11th Cir. No. 92-8584 (July 16, 1993).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 995 F.2d 1030 (1993) and is reprinted in the Appendix ("App.") to this Petition at 1 A. The Decision and Order of the United States District Court for the Northern District of Georgia, is reported at 825 F.Supp. 1023 (1992) and is reprinted at App. 28 A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 16, 1993. A timely petition for rehearing was denied by the Eleventh Circuit on September 28, 1993. App. 36 A.

On December 8, 1993 by order of Justice Kennedy, the time for filing this Petition was extended to, and including, February 18, 1994.

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201 (b) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 171 (b), provides as follows:

> It is the policy of the United States that--
>
> (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours,

> and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for disputes...

Section 301 (a) of the LMRA, 29 U.S.C. § 185 (a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Georgia Power Company (hereafter, "Company"), is a pubic utility which provides electricity throughout the State of Georgia. Local 84 is a labor organization which represents employees at the Company.

A collective bargaining agreement between the Company and Local 84 entitled "Memorandum of Agreement between Georgia Power Company and Local Union No. 84 of the International Brotherhood of Electrical Workers" (hereinafter referred to as "Agreement") was in full force and effect at all times material to the issues raised in this petition.

In 1988, the Company unilaterally implemented a bonus incentive pay program. That program, which was opposed by the Union from its inception, was made applicable

at only two locations; an electric steam generating plant and one of the Company's eight geographic marketing and distribution divisions. The Union filed a grievance protesting the implementation of the program which ultimately was submitted to arbitration.

Paragraph 65 of the Agreement provides for binding arbitration with an Arbitration Board made up of a Union arbitrator, a Company arbitrator and an impartial, or neutral arbitrator. Paragraph 65 makes the arbitrator's decision final and binding and grants the arbitrator the broadest possible authority. It states:

> The Arbitration Board shall hear all evidence and arguments on the points in dispute and the written decision of a majority of the members of such Board shall be final and binding upon the parties hereto. The Arbitration Board shall not interpret this Agreement in any manner so as to amend or supplement this Agreement.

Arbitrator Ferrin Y. Mathews was selected as the neutral arbitrator to hear the Union's grievance. The parties stipulated that the issue being presented for resolution was: "Whether the Georgia Power Company pilot incentive pay program violates the collective bargaining agreement; and, if so, what is the remedy?"

A hearing was held on September 15, 1989, and on February 7, 1990, Arbitrator Mathews issued a Tentative Opinion and Award (hereafter "Tentative Opinion and Award"), in which he determined that the Company's

implementation of the incentive pay program violated the Agreement. In his Tentative Opinion and Award, Arbitrator Mathews ordered that the Company immediately "terminate and rescind the Pilot Incentive Program, and to make no further payments under said Program ...."

During the pendency of the arbitration, the Company had paid out incentive pay bonuses to the employees in the program for the year 1988. At the time the Tentative Opinion and Award was received by the Union, the Company had begun payment of the incentive monies to its employees for 1989. Notwithstanding the arbitrator's ruling, the Company continued the payments.

The Union arbitrator dissented from Arbitrator Mathews' failure to award backpay as a remedy to the employees omitted from the program. The Company arbitrator dissented from the finding of a violation of the Agreement. Both partial arbitrators requested that Mr. Mathews reconsider his tentative award.

On April 27, 1990, following an executive session of the arbitration panel and further briefing on the remedy issue, Arbitrator Mathews issued a Reconsideration Of And Addendum To Opinion And Award. (Hereafter "Addendum"). In his Addendum, the arbitrator found that the Company had discriminated in favor of the employees who had received the bonuses and against those omitted from the program, and thus, had violated Paragraph 69 of the

Agreement which prohibits discrimination by the Company. As a remedy, Arbitrator Mathews ordered the Company to determine the amount of money paid to the bargaining unit employees participating in the Incentive Pay Program and to divide an equal amount among the non-participating employees.

The Company arbitrator dissented from the Addendum and requested that the arbitrator hold an additional hearing in order to permit the Company to present additional evidence regarding the appropriateness of damages as a remedy. A second hearing was held on June 18, 1990. At that hearing, the Company attorney agreed that the remaining issue was "what constituted an appropriate remedy?"

At the second hearing, the Company asserted only one position; that Paragraph 69 applied to only the types of discrimination which are made unlawful by federal statutes and thus did not constitute a general prohibition of discrimination. In its brief, the Company stated that the issue presented for the purposes of that brief was whether Paragraph 69 is intended only to prohibit those classes of discrimination which are prohibited by federal civil rights laws and regulations. In addition, at that hearing and in its post-hearing brief, not only did the company decline to argue that the damages tentatively awarded were punitive in nature but, the Company attorney specifically acknowledged that the damages were not inappropriate by virtue of being punitive.

In its brief the Company stated

> [the] Arbitrator has recognized that the employees who were not in Plant Bowen or the Macon Division were not entitled to a monetary award unless they were financially injured. In this case, unless [the non-discrimination clause] applied, they were paid what they were entitled to under the contract and they were not injured financially.

In a "Reconsideration of Tentative Opinion And Award, Rendered On February, 1990, And The Addendum Thereto, Rendered On April 27, 1990," (hereafter "Reconsideration"), Arbitrator Mathews ruled that Paragraph 69 prohibited discrimination in a general way and declined to modify his ordered remedy. This third opinion was dated October 8, 1990. The Union arbitrator concurred in the Reconsideration, and thus it became final and binding.

The Company sued in the District Court for the Northern District of Georgia to vacate the remedy portion of the award. The Union counterclaimed for enforcement. The Company asserted, among other reasons, that the damages portion of the award was unenforceable because the damages awarded were punitive in nature. The District Court granted the Company's motion for summary judgment and denied the Union's motion for summary judgment. The District Court found that the damages were punitive in nature and that, since the arbitrator had specifically found that the Company had not acted in bad faith, punitive damages were inappropriate because the awardance of punitive damages must be based on a finding of "substantial proof of willful or

wanton conduct". App. 20 - 24 A. The District Court further found that the arbitrator did not have the authority to award punitive damages because the contract did not authorize the awardance of punitive damages. App. 24 A. The Court of Appeals affirmed the District Court "for the reasons stated in [the District Court] Order." App. 31 A.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR CONFLICT BETWEEN THE ELEVENTH AND FOURTH CIRCUITS AND THE SECOND, SIXTH AND NINTH CIRCUITS ON AN IMPORTANT ISSUE OF LAW RELATING TO WHETHER A COURT SHOULD VACATE AN AWARD OF DAMAGES BY A LABOR ARBITRATOR WHICH IT DEEMS PUNITIVE UNLESS AN AWARD OF PUNITIVE DAMAGES IS SPECIFICALLY AUTHORIZED BY THE LABOR AGREEMENT.

Even though the arbitrator did not call them such, the Court of Appeals held that the damages were, in fact, punitive damages. The court then adopted the District Court's rationale that such damages did not draw their essence from the collective bargaining agreement because the arbitrator did not find willful and wanton conduct on the part of the Company and because the agreement did not specify that punitive damages were awardable. That ruling followed a decision from the Court of Appeals for the Fourth Circuit, *Baltimore Regional Joint Bd.* v. *Webster Clothes*, 596 F.2d 95 (4th Cir.

1979).[1] This approach was contrary to established authority in cases involving the enforcement of labor arbitration awards in the Second, Sixth and Ninth Circuits. Those Circuits hold that the arbitrator, not the Court, determines the limits of the arbitrator's authority to in formulate a remedy and that an award of punitive damages draws its essence from the agreement unless the agreement specifically *prohibits* such an award. *See, Hygrade Operators* v. *ILA Local 333*, 945 F. 2d 18, 23 (2nd Cir. 1991) (Award of punitive damages drew its essence from the agreement where a broad arbitration clause gave arbitrator the power to fashion an appropriate remedy); *Eberhand Foods, Inc.* v. *Jerome Handy*, 868 F.2d 890, 892-93 (6th Cir. 1988) (Where collective bargaining agreement does not expressly deny or limit an arbitrator's authority, the Court is required to defer to the arbitrator's construction of his authority under the agreement); *Goos-Golden West Sheet Metal, Inc.* v. *Local 104*, 933 F.2d 759, 764 (9th Cir. 1991) ("[I]n this case, we cannot say that the broad grant of power [in the agreement] would not even arguably include the power to make punitive damages."); *Teamsters* v. *Washington Employers, Inc.*, 557 F.2d

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[1] In addition to *Baltimore Regional Joint Bd.* v. *Webster Clothes*, the District Court cited *Local 34* v. *General Pipe Covering, Inc.*, 792 F.2d 96 (8th Cir. 1986) and *Howard P. Foley, Co.* v *IBEW Local No. 639*, 789 F.2d 1421 (9th Cir. 1986). Those cases, however, do not appear to be followed at this time in their respective circuits. *See, Local 1139* v. *Litton*, 728 F.2d 970 (8th Cir. 1986) and *Goos-Golden West* v. *Local 104*, 933 F.2d 759, 764 (9th Cir. 1991).

1345, 1349-50 (9th Cir. 1977) (Arbitrator, not court should determine if he had authority under contract and submission to award punitive damages pursuant to State law.)

The case of *Local 120* v. *Brooks Foundry*, 892 F.2d 1283, 1287-89 (6th Cir. 1990) is virtually identical to the present case. In that case, the arbitrator found that an Employer had violated the wage provisions of its labor agreement by paying a single employee at a rate higher than that called for in the agreement and higher than the other employees. The Union in that case asked for damages equal to the difference for all employees; an amount calculated to be $130,000. Instead, because he felt the Company would be unable to pay the full amount, the arbitrator awarded 10% of that amount, or $13,000. In *Brooks Foundry*, the court specifically noted the fact that the remedy did not rationally relate to the losses suffered as measured by the difference in income, but after doing so stated:

> where conduct of one party is arguably subject to arbitration, we will defer to the arbitrator's authority to fashion a unique remedy, where the remedy does not appear to have been expressly barred by the collective bargaining agreement,... (Emphasis added).

Id. at 1290

Thus, it appears that a clear split exists between the circuits regarding appropriate review in cases where an arbitrator has awarded damages which a reviewing court considers to be punitive in nature.

II. THE DECISION FROM THE ELEVENTH CIRCUIT CONFLICTS WITH AUTHORITY FROM THE FOURTH, SEVENTH, EIGHTH AND NINTH CIRCUITS ON AN IMPORTANT ISSUE OF LAW RELATING TO WHETHER AN EMPLOYER WAIVES A DEFENSE TO A UNION'S GRIEVANCE BY FAILING TO RAISE IT OR BY ABANDONING IT IN THE PROCEEDING BEFORE THE ARBITRATOR.

The Court of Appeals' decision totally ignored the fact that after the arbitrator had tentatively awarded damages, it was the Company that requested a second hearing to present evidence regarding the appropriateness of those damages and that, in that hearing, the Company made clear it was conceding that those damages were not punitive in nature. Moreover, in that second hearing the Company asserted only one position; that the non-discrimination clause of the collective bargaining agreement could not be the basis for damages because it was intended to prohibit only the types of discrimination statutorily prohibited under federal law.

The authority from other circuits is that an Employer waives defenses to a Union's grievance by failing to urge them in the arbitration proceeding.

In the case of *United Food & Commercial Workers Local 100A v. John Hofmeister and Son,* 950 F.2d 1340 (7th Cir. 1991), the Seventh Circuit held that where an employer had declined to present evidence regarding a Grievant's medical condition to an arbitrator it had waived the defense that the backpay portion of the arbitration award should be vacated because the

employee was injured and thus unable to perform work. In so doing the Court stated:

> Permitting parties to keep silent during arbitration and raise arguments in enforcement proceedings would "undermine the purpose of arbitration.

Id. at 1345. *Accord: National Wrecking Company v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993); ("Parties such as National, cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in federal court. We will not tolerate such sandbagging."); *Dreis & Krump Mfg. v. IAM Dist. Council No. 8*, 802 F.2d 247, 252 (7th Cir. 1986) (By agreeing to arbitrate issue of whether collective bargaining agreement prohibited it from subcontracting while welders were on layoff, Employer waived right to claim that management rights clause is so broad that it makes subcontracting issue non-arbitrable); *Jones Dairy Farm v. United Food and Comm. Wkrs. Union, Local P-1236*, 760 F.2d 173, 175-76 (7th Cir. 1985) (If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it).

The Eighth Circuit has followed the same rule. *See Capital City Tel. Co.* v. *Communications Workers of America, Local No. 6301*, 575 F.2d 655 (8th Cir. 1978) ("Our review of the record does not reveal one instance of protest by [the employer] concerning the arbitration of the damage issue until after the arbitrator held adversely to the Plaintiff.").

Likewise, the Ninth Circuit has recognized that an Employer waives defenses that might otherwise be raised in an action to vacate an award by agreeing to have the arbitrator decide the applicability of that defense. The rule and its rationale was stated in *Teamsters* v. *Washington Employer, Inc., supra,*

> [T]he Employers agreed to arbitrate the dispute and stipulated that the "sole issue" was whether the Employers' withholding of the wage increases had violated the relevant statues...It was only after the arbitrator had decided this issue adversely to the Employers that they sought to raise for the first time the claim that the arbitrator had exceeded his jurisdiction by basing his decision on preempted laws.

Id. at 557 F.2d 1349-50.

Likewise, the Fourth Circuit has recognized that in an action to vacate, an Employer waives any defenses not properly presented to the arbitrator for resolution. In the case of *United Food and Commercial Workers, Local 400* v. *Marval Poultry Company*, 876 F.2d 346, 352 (4th Cir. 1989) it stated as follows:

> "We have held that a party to arbitration cannot voluntarily engage in the arbitration of issues submitted to the arbitrator and then attack the award on grounds not raised before the arbitrator."

quoting, International Chem. Workers Union v. *Mobag Chem. Corp.*, 755 F.2d 1107, 1112 (4th Cir. 1985).

In the present case, Georgia Power Company impliedly and expressly accepted the arbitrator's conclusion that the damages awarded by his tentative award were not punitive and were appropriate unless he had misconstrued the non-

discrimination clause of the collective bargaining agreement. Then, after the arbitrator construed the non-discrimination clause against the Company's position in a hearing that the Company requested, it sought to vacate the damages portion of the arbitrator's award on the basis that they were punitive. Even though the waiver issue was extensively briefed and argued in oral argument, the Court of Appeals failed to address that issue. By not doing so, it, in effect, decided this case in a manner which conflicts with established authority from other circuits and, in effect, sanctions and permits conduct on the part of an Employer that is prohibited in other circuits.

III. THE DECISION BELOW IS CLEARLY WRONG: THE DECISION DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

The Eleventh Circuit panel found that the damages awarded by the Arbitrator were punitive in nature because there was "no causal relationship between the Company's breach and the Union's loss," and that no "basis exists for the Arbitrator's conclusion that the Company's violation of the Non-Discrimination provision [of the collective bargaining agreement] caused non-participating employees to suffer a monetary loss of any sort traditionally justifying an award of compensatory damages." App. 32 A.

Thus the Court's decision was based on its conclusion that the Arbitrator made a mistake of law. This Court has held

that a court should not vacate a labor arbitrator's award because it believes that he, or she, may have committed errors of fact and law. *See, United Paperworkers Int'l. Union v. Misco*, 484 U.S. 29, 38, 98 L.Ed.2d 286, 299, 108 S.Ct. 367, 371 (1987). This rule was stated in *Misco*.

> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. (Citing *United Steelworkers of America v. Enterprise Wheel and Car Co.*, 363 U.S. 593, 599, 4 L.Ed.2d 1424) 80 S.Ct. 1358 (1960).

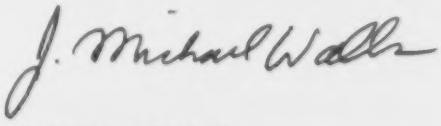
Id.

The Court of Appeals decision on its face totally ignored that mandate which has been the bedrock of the law governing enforcement of labor arbitration awards since the "Steelworkers Trilogy" was decided in 1960. *See, United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 4 L. Ed.2d 1424, 80 S.Ct. 1358 (1960); *United Steelworkers of America v. America Mfg. Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed.2d 1411, 80 S.Ct. 1347 (1960).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,



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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
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JUN 4 1992

LUTHER D. THOMAS, Clerk
By: /s/
Deputy Clerk

GEORGIA POWER CO.,

V.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 84,

CIVIL NO. 1:91-cv-15-ODE

ORDER

This action for vacation of an arbitration award is before the court on Plaintiff's motion for an extension of time within which motions for summary judgment may be filed, Plaintiff's motion for an extension of time within which responses to motions for summary judgment may be filed, and the parties' cross motions for summary judgment.

As an initial matter, Plaintiff's two motions for extensions of time are DISMISSED AS MOOT. Defendant did not oppose either motion and each party has now filed a motion for summary judgment and a response to the adverse party's motion for summary judgment.

The basic facts giving rise to this action are undisputed and the parties agree that this case is ripe for disposition on summary judgment. Effective July 1, 1987, Plaintiff Georgia

Power Company ("Georgia Power" or "Company") and Defendant International Brotherhood of Electrical Workers, Local 84 ("Union") executed a collective bargaining agreement entitled "Memorandum of Agreement between Georgia Power Company and Local Union No. 84 of the International Brotherhood of Electrical Workers" ("Collective Bargaining Agreement" or "Agreement"). This Agreement was in force during all times material to this action. Paragraph 65 of the Agreement provides for arbitration of certain disputes between the Company and the Union. Complaint, Exh. A, ¶ 65.[1]

During the first six months of 1988, the Company and the Union conducted negotiations regarding the Company's proposed implementation of a Pilot Incentive Pay Program ("Program"). Following an impasse in negotiations, the Company unilaterally implemented this Program for employees at its Plant Bowen and in its Macon Division.[2] In August of 1988, the Union filed a grievance regarding the Company's implementation of the Program. The Company denied this grievance, and pursuant to Paragraph 65 of the Agreement, the parties submitted their dispute to arbitration.

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[1] Neither party contends that the dispute at issue in this case was improperly submitted to arbitration.

[2] Under the Pilot Incentive Pay Program, the Company paid employees at Plant Bowen and in the Macon Division fifty percent of the savings they generated. The savings generated were measured according to a formula developed by the Company.

The Arbitration Board was composed of Howard Winkler, the Company arbitrator, Doyle Howard, the Union Arbitrator, and Ferrin Y. Mathews, a neutral arbitrator selected by agreement of the parties.

The Arbitration Board held an evidentiary hearing regarding the parties' dispute on September 15, 1989. On February 7, 1990, Arbitrator Mathews issued a Tentative Opinion and Award, which at that time was neither a final decision of the Arbitration Board nor a binding order. In the Tentative opinion and Award, Arbitrator Mathews found that the Company's implementation of the Pilot Incentive Pay Program violated the Collective Bargaining

Agreement. Stipulated Exh. G (Opinion of February 7, 1990), p. 60. Arbitrator Mathews first determined that the cash awards the Company had paid out under the Program constituted "wages" and "rates of pay," which are mandatory subjects of bargaining under the Agreement. Id. at 42. He further found that these cash awards altered the wage schedules which had been negotiated by the Company and the Union. Id. at 44, 49. Arbitrator Mathews thus concluded that the Company had violated the Agreement by altering the negotiated wage

schedules without the consent of the Union. Id. at 49.[3]

Arbitrator Mathews, however, rejected the Union's request that he award "the same percentage of wages, as that which was paid to the employees at Plant Bowen, to all of the Company's employee's system wide." Id. at 57. Arbitrator Mathews concluded that no basis existed to support an award of monetary damages:

> As also contended by the Company, no employee of the Bargaining Unit has suffered a monetary loss. For the year 1988, the Company paid to the participating employees the amount due them under the program. The remaining members of the Bargaining Unit did not participate in the Pilot Incentive Pay Program, and hence were promised nothing by the Company. Since it has been found that the action of the Company in implementing the program was wrongful, the employees, at locations other than Plant Bowen and the Macon Division,
>
> 3
>
> would have no legal basis to compel any payment from the Company.

Id. at 58-59. Arbitrator Mathews noted that the issuance of an award to employees who did not participate in the Program would be "in the nature of a penalty, and does not 'make

---

[3] Article XIX of the Agreement provides in part, "This Agreement shall be subject to amendment at any time by mutual consent of the parties hereto. Such amendments shall be reduced to writing, state the effective date of the amendment, be executed and approved in the same manner as this Agreement." Complaint, Exh. A, ¶ 70.

whole' employees for a monetary loss suffered." Id. at 59.

On February 12, 1990, the Arbitration Board held an executive session. At that session, Mr. Winkler, the Company Arbitrator, informed the Board that immediately before receipt of the Tentative Opinion and Award, Georgia Power had made payments under the Program for the year 1989. Stipulated Exh. L (Reconsideration of and Addendum to Opinion and Award Rendered February 7, 1990), p. 1. Mr. Howard, the Union Arbitrator, argued that these payments were undertaken in bad faith and once again urged Arbitrator Mathews to require the Company to pay monetary damages. Arbitrator Mathews ordered further briefing on the question of whether Union members who did not participate in the Program were entitled to monetary relief. On March 8, 1990, the parties submitted briefs on that issue.

On April 27, 1990, Arbitrator Mathews issued a Reconsideration of and Addendum to Opinion and Award Rendered February 7, 1990 ("Addendum"). In this Addendum, Arbitrator Mathews concluded that the Company should be required to pay monetary damages to Union members who did not participate in the Pilot Incentive Pay Program. He ordered the following remedy:

> The Company is ordered to immediately determine the amount of money paid to the Bargaining Unit employees participating in

> the Incentive Pay Program for the years 1988 and 1989 at Plant Bowen and in the Macon Division. That amount, so determined shall constitute the amount of money which the Company shall immediately pay to the Bargaining Unit employees who did not participate in the Incentive Pay Program. The payment to said employees shall be by the same method and on the same basis utilized by the Company in making the payment to the Bargaining Unit employees at Plant Bowen and in the Macon Division.

stipulated Exh. L, p. 100.

Arbitrator Mathews adhered to his original conclusion that "no employee of the Bargaining Unit, not a part of the Program, has suffered a monetary loss as that employee had not been promised anything by the Company." Id. at 18. However, upon reconsideration, he concluded that those employees "may have suffered monetary loss on another basis." Id. Arbitrator Mathews reached this conclusion on the basis of Paragraph 69 of the Agreement, entitled "Non-Discrimination, " and Paragraph 50 of the Agreement, entitled "Wage Rates." Paragraph 69 provides:

> The Company and the Union... agree that the provisions of this Agreement shall continue to apply to all employees covered by this Agreement without discrimination and that in carrying out the respective obligations under this Agreement there will be no discrimination against any qualified employee or applicant on account of race, creed, color, sex, age (40 and over), national origin, handicap or status as a veteran.

Complaint, Exh. A, ¶ 69. Paragraph 50 provides in relevant part, "For all employees of the Company covered by this Agreement, wages at the rates shown in Exhibit 'A'... shall be the base rates paid for 40 hours work per work week." Id. at ¶ 50.

Arbitrator Mathews found that the Company had violated Paragraph 69 by altering the wages of selected employees:

> Thus, it becomes apparent that when the Company selected Plant Bowen and the Macon Division as the sites for the Incentive Pay Program, and selected employees at those locations to participate in the Program, the Company, in effect, changed the wages for selected employees from those shown in "Exhibit 'A' " so that the wages contained in that Exhibit were no longer the wages for "all employees of the Company covered by this Agreement." Thus, the Company did not, as required by [Paragraph 69], continue to apply the provisions of the Agreement [Paragraphs 50 and 51] to all of the employees covered by the Agreement without discrimination. Those members of the Bargaining Unit who were not participants in the Program were discriminated against, as those employees of the Bargaining Unit, participating in the Program, received increases of wages while occupying the same classifications as those members of the Bargaining Unit not participating in the Program. Those employees who suffered discrimination by virtue of the difference in wages are entitled to be compensated because of that discriminatory action on behalf of the Company.

Id. at 18-19.

By letter dated May 2, 1990, Mr. Winkler dissented from the Addendum and requested an executive session of the Arbitration Board. On June 18, 1990, the Arbitration Board held a hearing regarding the scope and meaning of Paragraph 69. The Company argued that the provision applies only to discrimination "on account of race, creed, color, sex, age (40 and over), national origin, handicap or status as a veteran." On October 8, 1990, Arbitrator Mathews issued an opinion in which he declined to modify

the remedy he had ordered. Mr. Howard concurred in this opinion, thereby making it a final and binding decision of the Arbitration Board.

On January 4, 1991, Georgia Power filed its complaint in this action, seeking vacation of that portion of the arbitration award which requires it to pay monetary damages to Union employees who did not participate in the Pilot Incentive Pay Program.[4] The Company advances four bases for vacation of the award: (1) the monetary remedy ordered by the Arbitration Board constitutes an unauthorized award of punitive damages; (2) the award conflicts with the Collective Bargaining

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[4] The Company states that it would be required to pay $2,657,164.44 under the final arbitration award. Affidavit of Don B. Ellis (Georgia Power Company Labor Relations Manager), ¶4 (submitted with Plaintiff's Statement of Material Facts as to Which There is no Genuine Issue to be Tried).

Agreement because it exceeds the Arbitration Board's authority to award backpay and because the award itself violates the wage schedules set forth in the Agreement; (3) no evidence exists to support the Arbitrator's construction of Paragraph 69 of the Agreement; and (4) the award is irrational. The Union has counterclaimed, seeking enforcement of the arbitration award.

The court notes initially that its review of the arbitration award at issue "is limited to a determination of whether [the] award is irrational, whether it fails to draw its essence from the collective bargaining agreement or whether it exceeds the scope of the arbitrator's authority." Butterkrust Bakeries v. Bakery, Confectionary and Tobacco Workers Local No.

361, 726 F.2d 698, 699 (11th Cir. 1984). As the Supreme Court stated in United Paperworkers Int'l Union v. Misco, "As long as the arbitrator's award 'draws it essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate. 484 U.S. 29, 36 (1987) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

Georgia Power's initial contention is that the monetary relief ordered by the Arbitration Board constitutes an unauthorized award of punitive damages. This contention consists of two separate arguments: (1) the monetary relief

ordered by the Arbitration Board constitutes an award of punitive damages; (2) the Arbitration Board lacked the authority to order the monetary relief contained in the arbitration award.

A review of the April 27, 1990 Addendum reveals that the damages awarded by the Arbitration Board are punitive in nature. In the Addendum, Arbitrator Mathews found that the Company had discriminated against employees who did not participate in the Pilot Incentive Pay Program by selectively altering the wages of employees at Plant Bowen and in the Macon Division. Specifically, the Company had provided employees at Plant Bowen and in the Macon Division the opportunity to effect savings under the Program and thereby to increase their wages, while not providing a similar opportunity to employees at other locations. Stipulated Exh. L, p. 21. Arbitrator Mathews concluded that the Company's actions violated Paragraph 69 of the Agreement. While the court does not

share Arbitrator Mathews' view of Paragraph 69, both the parties and the court are bound by his interpretation of that provision. United Paperworkers Int'l Union v. Misco, 484 U.S. at 38("The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should

not reject an award on the ground that the arbitrator misread the contract.").

No evidence exists, however, to support Arbitrator Mathews' conclusion that employees who did not participate in the Pilot Incentive Pay Program suffered a monetary loss because of the Company's discriminatory selection of employees at Plant Bowen and in the Macon Division. Arbitrator Mathews reasoned as follows:

> The payment which will be ordered to be made to those members of the Bargaining Unit, who did not participate in the Incentive Pay Program, is not a payment to them for any loss which they may have suffered because of a promised payment by the Company, but it is a payment to compensate them for the extent to which they suffered discrimination through the action of the Company in not allowing them to participate in the Program and to achieve the wages as did those employees at Plant Bowen and in the Macon Division.
>
> ... The [non-participating employees] have however, by virtue of the discrimination practiced by the Company, suffered a financial loss.

Id. at 22. In short, Arbitrator Mathews concluded that employees at locations other than Plant Bowen and in the Macon Division were "deprived of the opportunity to effect savings" by their exclusion from the Pilot Incentive Pay Program. Id. at 21.

For the damage award in this action to be validly compensatory, there must be a causal relationship between the Company's breach of the Agreement and the loss claimed by the Union. Baltimore Regional Joint Board v. Webster Clothes, Inc., 596 F.2d 95, 98 (4th Cir. 1979) (affirming district court's vacation of arbitration award as unauthorized award of punitive damages where no evidence establishes that company's breach of collective bargaining agreement caused union employees to suffer monetary loss); Westinghouse Electric Corp., Aerospace Division v. IBEW Local 1805, 561 F .2d 521, 523-24 (4th Cir. 1977), cert. denied, 434 U.S. 1036 (1978) (same). "Ordinarily, an award that exceeds the monetary loss which an injured party suffered as a result of a contract breach is considered punitive." Desert Palace v. Local Joint Executive Board of Las Vegas, 679 F.2d 789, 794 (9th Cir. 1982) (citing Westinghouse, 561 F.2d at 523-524). An arbitrator's denomination of an award as compensatory will not prevent a court from determining that the award is in fact punitive. Westinghouse, 561 F.2d at 524; Baltimore Regional Joint Board, 596 F.2d at 98.

Arbitrator Mathews' opinion in the April 27, 1990 Addendum fails to establish a causal relationship between the Company's violation of the Agreement and any monetary loss on the part of employees who did not participate in the Pilot Incentive Pay Program. The Addendum omits any discussion concerning what the position of those employees would have

been in the absence of the Company's violation of the Agreement. The relevant question is

what the position of employees at locations other than Plant Bowen and the Macon Division would have been had the Company not discriminatorily selected employees at those two sites to participate in the Pilot Incentive Pay Program. Under Arbitrator Mathews' interpretation of the Agreement, the Company could only have complied with Paragraph 69 by implementing the Pilot Incentive Pay Program company-wide or by not implementing the Program at all.[5]

Arbitrator Mathews made no finding that Georgia Power would, under any circumstances, have implemented the Program company-wide. Yet, his conclusion that employees at locations other than Plant Bowen and the Macon Division suffered monetary loss rests directly on the assumption that a company-wide program would have been implemented absent a violation of Paragraph 69. The only way that employees at locations other than Plant Bowen and the Macon Division could have been "deprived of the opportunity to effect savings" is if Georgia Power would have complied with Paragraph 69 by implementing the Pilot

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[5] Obviously, if Georgia Power had complied with Paragraph 69 by not implementing the Program at all, no employee can claim to have suffered monetary loss.

Incentive Pay Program at all of its plants. There was no evidence before the Arbitration Board, however, establishing that the Company would have implemented an incentive pay program company-wide without first undertaking a pilot experiment.[6] In the absence of such evidence, the monetary

relief ordered by the Arbitration Board must be considered punitive.

In the Tentative Opinion and Award rendered February 7, 1990, Arbitrator Mathews appeared to recognize that an award of monetary damages to employees who did not participate in the Pilot Incentive Pay Program would be punitive in nature. In rejecting the Union's initial claim for monetary relief, Arbitrator Mathews stated:

> See also Servomation of Chattanooga, Inc., 60 LA 402 (Rayson, 1973), cited by the Company, and in which it was held that the Union was not entitled to an award requiring the employer to pay other members of the bargaining unit an

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[6] In fact, the record contains substantial evidence suggesting that the Company viewed an experimental pilot program as a prerequisite to implementation of a company-wide incentive pay program. James P. McCloy, Georgia Power's former Manager of Corporate Planning, testified that the Company "wanted to make sure that when they put the [incentive pay program] in, across the Company, they would have gone through some experience, learned where the problems were, and had an opportunity to fix them." Stipulated Exh. L, p.9.

> incentive bonus that it had paid to one unit member, admittedly in violation of the recognition clause of the collective bargaining unit, since the payment of the bonus to the recipient could not have deprived other members of a bonus, in view of the absence of the contract providing for bonus payments to the other members. As stated therein, a remedy of that nature is in the nature of a penalty, and does not "make whole" employees for a monetary loss suffered.
>
> Accordingly, no monetary award will be made to the members of the Bargaining Unit, system wide.

Stipulated Exh. L., p. 59. In the Addendum of April 27, 1990, Arbitrator Mathews did not find that any of the facts surrounding the Company's implementation of the Pilot Incentive Pay Program had

changed. Rather, he merely reached the legal conclusion that the Company's actions constituted a violation of Paragraph 69 of the Agreement. This additional legal conclusion in no way suggested that employees at locations other than Plant Bowen and the Macon Division had suffered no monetary loss.

It is perhaps significant that the Union does not attempt to establish the compensatory nature of the monetary damages awarded by the Arbitration Board on the same basis as Arbitrator Mathews. The Union contends that the monetary relief ordered by the Arbitration Board constitutes an award of

"backpay."[7] The Union argues that employees who did not participate in the Pilot Incentive Pay Program "'earned' their back pay to the same extent as those who 'earned' their bonuses under the incentive pay program." Defendants Brief in Opposition to Plaintiff's Motion for Summary Judgment, p. 2. The crux of the Union's argument is that employees at Plant Bowen and in the Macon Division did not perform any additional work to receive bonuses under the Program:

> In fact, no one at either of the locations where the bonus plan was in effect did anything differently than similarly-situated employees at any other location. The reality is that employees at Plant Bowen and in the Macon Division were paid greater wages than their counterparts in other locations for performing the identical work. If they "earned" their incentive pay by so doing, then, just as surely, the employees at other locations

> "earned" the back pay awarded by the Arbitrator Mathews.

Id. at 2-3.

The primary difficulty with the Union's argument is that it is not based on any findings of fact by the Arbitration Board. Arbitrator Mathews did not find that employees at locations other than Plant Bowen and the Macon Division performed the same work as employees at those two sites. To

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[7] Arbitrator Mathews never characterized the monetary relief he ordered as "backpay."

the contrary, he stated, "From the evidence, it does appear that the Company was successful, by virtue of its Incentive Program, in getting employees to work smarter, and work harder." Stipulated Exh. G, p. 45. In other words, the employees at Plant Bowen and in the Macon Division were not, as the Union contends, simply paid more for the performing the same work that employees at other plants were performing.

The court concludes that the damages awarded by the Arbitration Board are punitive in nature. No factual or legal basis exists for Arbitrator Mathews' conclusion that the Company's violation of Paragraph 69 of the Collective Bargaining Agreement caused employees at locations other than Plant Bowen and the Macon Division to suffer monetary loss. As the Fourth Circuit stated in Baltimore Regional Joint Board, "There was simply no rationally probative evidence on the record before the arbitrator that [Georgia Power's] breach caused in fact a loss to its employees of any sort traditionally justifying an award of compensatory damages." 596 F.2d at 98.

The amount of damages awarded by the Arbitration Board further demonstrates that the award was not compensatory in nature.

The Arbitration Board ordered the Company to determine the amount of money it had paid to employees participating in the Pilot Incentive Pay Program for the years 1988 and 1989 and to distribute that same amount among Union employees who did not participate in the Program. In other words, the Company was to determine how much money it had paid to employees at Plant Bowen and in the Macon Division and to distribute that same amount among Union employees at Georgia Power's sixty other plants and its seven other divisions. Arbitrator Mathews settled on this amount of damages for the following reasons:

> In order to treat the "discriminated against employees" of the Bargaining Unit in the same manner as the preferred groups of employees, an amount of money equal to the total of that paid to the employes of the Bargaining Unit in preferred groups should be paid to those employees in the Bargaining Unit who did not participate in the Program. Those employees who did not participate may individually receive a lesser dollar amount than those employees who did participate in the Program, but as a member of the group, their group will have been treated the same as the groups of the preferred employees.

Stipulated Exh. L, p. 20.

Arbitrator Mathews himself recognized the entirely speculative nature of this damage award:

> The foregoing furnishes a measure of the damage suffered by the employees in the Bargaining Unit who were not allowed to participate in the

> Program, but a precise mathematical calculation of the amount of the damages is probably impossible. Had the employees in the Bargaining Unit, who were discriminated against, participated in the Program, the amounts received by them would have been the result of the

> savings effected by them. As demonstrated by the difference in the savings effected at Plant Bowen and at the Macon Division during 1988, the savings effected by the non-participating employees, had they participated in the Program, could well have been more or less than those at Plant Bowen and in the Macon Division; and the dollar amount received by each employee could have been lesser or greater than that received by the individual employees at Plant Bowen and in the Macon Division.

Id.

The measure of damages chosen by Arbitrator Mathews was not based on any findings regarding the actual savings employees at locations other than Plant Bowen and the Macon Division would have effected had they participated in the Incentive Pay Program. Arbitrator Mathews made no finding that such employees would have effected any savings and specifically recognized the possibility that such employees would have received less under the Incentive Pay Program than they are entitled to receive under his award. Arbitrator Mathews simply determined that the amount of savings effected by employees at Plant Bowen and in the Macon

Division was the appropriate measure of damages in this case. This measure of damages, however, does not in any way correlate to the "loss" claimed by the Union and must be considered punitive.

The court has concluded above that the monetary relief ordered by the Arbitration Board constitutes an award of punitive damages. The court, however, need not reach the question of whether the Board possessed the authority to render such an award. Arbitrator Mathews himself determined that punitive damages were not appropriate in this case. During the course of the arbitration

proceedings, the Union consistently took the position that the Company had acted in bad faith and urged Arbitrator Mathews to render an award of punitive damages. Stipulated Exh. L, p. 15. Arbitrator Mathews first rejected the Union's position in his Tentative Opinion and Award of February 7, 1990:

> The evidence has not established, as the Company has contended, that the Company in implementing the Pilot Incentive Pay Program acted wilfully or wantonly. The implementation occurred only after the Company had determined that it had negotiated in good faith with the Union to impasse. While the acts of the Company may not have constituted negotiation, or may have even been surface bargaining, the evidence has not established any willful or wanton conduct on the part of the Company in connection with the Pilot Incentive Pay Program.

Stipulated Exh. G, p. 58. In his Addendum of April 27, 1990, Arbitrator Mathews reaffirmed his rejection of the Union's contention that the Company had acted wilfully and in bad faith. Stipulated Exh. L, p. 16.

The award of monetary damages to Union members who did not participate in the Pilot Incentive Pay Program "fails to draw its essence from the collective bargaining agreement." Butterkrust Bakeries v. Bakery, Confectionary and Tobacco Workers Local No. 361, 726 F.2d 698, 699 (11th Cir. 1984). The award is not sustainable as an award of compensatory damages because there was no evidence before Arbitrator Mathews establishing that the Company's breach of the Collective Bargaining Agreement caused employees who did not participate in the Pilot Incentive Pay Program to suffer any monetary loss. The award is not sustainable

as an award of punitive damages because Arbitrator Mathews himself determined that the Company had not acted willfully or in bad faith.

This court is well aware that "arbitrators have broad powers to craft appropriate relief." Bruno's Inc. v. United Food and Commercial Workers Int'l Union, Local 1657, 858 F.2d 1529, 1531 (11th Cir. 1988). Indeed, it is well established that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his

informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). The remedy formulated by an arbitrator must, however, be grounded in the agreement of the parties. The remedy ordered by the Arbitration Board in this case is not.

The rationale of the Fourth Circuit in Baltimore Regional Joint Board v. Webster Clothes, Inc., 596 F.2d 95 (4th Cir. 1979), is generally applicable here. In that case, an arbitrator found that a clothing company had breached a collective bargaining agreement by subcontracting certain manufacturing work without union consent. The arbitrator determined that the company's breach of the agreement had caused the union to suffer a payroll loss of $80,000 and ordered the company to distribute that sum among its former employees. The district court, however, vacated the arbitration award on the basis of undisputed evidence that the clothing company's plant was operating at full capacity

at the time the subcontract was in effect. Thus, even if the company had complied with the agreement, union employees would have been unable to perform the work the company had subcontracted. The district court concluded that "as a matter of law there had been no showing of actual damages

resulting from [the company's] breach of the agreement." 596 F.2d at 98.

The Fourth Circuit affirmed on the basis that there was no evidence establishing that the company's breach of the agreement had caused any monetary loss. The Court of Appeals noted the wide "latitude afforded arbitrators in fashioning remedies in United Steelworkers of America v. Enterprise Wheel & Car Corp., " but concluded:

> Nothing said in Enterprise Wheel negates the requirement that compensatory damages be based upon cognizable loss causally traceable to breach... The award of damages in the present case does not draw its essence from the bargaining agreement, for the agreements's essence does not contemplate punitive, but only compensatory awards. Though not termed punitive, the award here can only be such, for there is nothing in the record showing it validly compensatory, and it is manifestly not nominal. In the absence of any provision for punitive awards, and of any substantiating proof of willful or wanton conduct, an arbitrator may not make an award of punitive damages for breach of a collective bargaining agreement.

596 F.2d at 98 (citing Westinghouse Electric Corp., Aerospace Division v. IBEW Local 1805, 561 F.2d 521, 523-24 (4th Cir. 1977), cert. denied, 434 U.S. 1036 (1978)).

The Fourth Circuit's reasoning in Baltimore Regional Joint Board, while instructive, is not wholly applicable in this

case. The Collective Bargaining Agreement in this case does not contain a provision authorizing the Arbitration Board to award punitive damages. However, in Willoughby Roofing & Supply Co. v. Kajima Int'l Inc., 598 F. Supp. 353 (N.D. Ala. 1984), aff'd on basis of district court opinion, 776 F.2d 269 (11th Cir. 1985), the Eleventh Circuit upheld the authority of an arbitration panel to render an award of punitive damages despite the absence to an express provision for such damages in the parties' contract. See also, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1386-87 (11th Cir. 1988).[8] An open question thus remains as to whether the Arbitration Board possessed the general authority to render an award of punitive damages in this case.

No question remains, however, regarding the absence "of any substantiating proof of willful or wanton conduct" on the part of Georgia Power. Baltimore Regional Joint Board,

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[8] Willoughby Roofing & Supply is in conflict with several circuit court decisions holding that arbitrators may not award punitive damages absent an express provision in a collective bargaining agreement. See, Howard P. Foley Co v. Int'l Brotherhood of Electrical Workers, Local 639, 789 F.2d 1421 (9th Cir. 1986); Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, Local Union 34, AFL-CIO v. General Pipe Covering, Inc., 792 F.d 96 (8th Cir. 1986); Baltimore Regional Joint Board v. Webster Clothes, Inc., 596 F.2d 95 (4th Cir. 1979). In Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1388 (11th Cir. 1988), Judge Tjoflat concurred specially to "air [his] reservations about the wisdom" of Willoughby Roofing & Supply.

596 F.2d at 98. Arbitrator Mathews determined that "the evidence has not established any willful or wanton conduct on the part of the Company in connection with the Pilot Incentive Pay Program." Stipulated Exh. G, p. 58. While "an arbitrator is not required to

make formalized findings or to offer reasons for his decisions, when he does so, a court may properly consider them." United Electrical, Radio and Machine Workers of America, Local 1139 v. Litton Microwave Cooking Products, Litton Systems, Inc., 704 F.2d 393, 397 (8th Cir. 1983).

Nothing said in Willoughby Roofing & Supply suggests that an arbitration panel may render an award of punitive damages against a party where that panel specifically finds that the party has not engaged in any willful of wanton behavior.[9] The Union has offered no argument or evidence to establish that the Collective Bargaining Agreement conferred such authority on the Arbitration Board.[10] The court is thus

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[9] In Willoughby Roofing & Supply, a panel of arbitrators awarded punitive damages to a subcontractor where it found the contractor "guilty of willful misrepresentations of material fact concerning the transaction at it issue." 598 F. Supp. at 354-55.

[10] The Union, relying on Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehoue Independent Truck Drivers Union, Local No. 1, 611 F.2d 580

constrained to conclude that the Arbitration Board's award of monetary damages does not draw its essence from the Collective Bargaining Agreement.

The Union contends that if the court determines that the remedy ordered by the Arbitration Board is punitive in nature, it should remand this action. No basis for a remand exists,

however. There was no evidence before the Arbitration Board establishing that the Company's breach of the Collective Bargaining Agreement caused any employees to suffer monetary loss. In addition, the Arbitration Board has already held two evidentiary hearings and two executive sessions in this matter.

For the foregoing reasons, Plaintiff's motion for summary judgment is GRANTED. The portion of the arbitration award which requires Georgia Power to pay monetary damages to Union employees who did not participate

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(5th Cir. 1980) has merely contended that by submitting the question of the appropriate remedy in this case to arbitration the Company acceded to any award the Arbitration Board rendered. Piggly Wiggly, however, addresses only the question of an arbitrator's authority to resolve a specific question, not the scope of the arbitrator's remedial authority. In any case, the Union overlooks the requirement that an arbitrator's award draw its essence from the collective bargaining agreement.

in the Pilot Incentive Pay Program is hereby VACATED. Defendant's motion for summary judgment is DENIED.

Accordingly, Plaintiff's motion for an extension of time within which motions for summary judgment may be filed [15-1] is DISMISSED AS MOOT. Plaintiff's motion for an extension of time within which responses to summary judgment motions may be filed [18-1] is also DISMISSED AS MOOT. Plaintiff's motion for summary judgment [17-1] is GRANTED. Defendant's motion for summary judgment [16-1] is DENIED.

So ordered, this 4 day of June, 1992.

/s/ ORINDA D. EVANS
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

JUN 5 1992

L.D.T., CLERK

BY

DEPUTY CLERK

GEORGIA POWER CO. v. IBEW, LOCAL 84
GEORGIA POWER CO., Plaintiff,
Counter -defendant, Appellee,,
v.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 84,
Defendant, Counter-claimant, Appellant.

No. 92-8584.

United States Court of Appeals,
Eleventh Circuit.

July 16, 1993.

Appeal from the United States District Court for the Northern District of Georgia.

Before BLACK and CARNES, Circuit Judges and RONEY, Senior Circuit Judge.

RONEY, Senior Circuit Judge:

In this appeal from a summary judgment vacating an arbitration award, we affirm the judgment of the district court which held that the damages awarded by the board of arbitrators were punitive in nature and therefore permissible in light of the arbitrators' finding that punitive damages were not warranted under the circumstances of this breach of a collective bargaining agreement.

Plaintiff Georgia Power Company and Defendant International Brotherhood of Electrical Workers, Local 84 (Union) executed a Collective Bargaining Agreement effective July 1, 1987. This Agreement which was in force at all times

material to this action, provides for arbitration of certain disputes between the Company and the Union.

The arbitration award grew out of a grievance filed by the Union concerning a Pilot Incentive Pay Program established by the defendant at one of its 61 power plants and in one of its eight geographic divisions. In brief, the final award, concurred in by two of the three Arbitrators, found that the implementation of this program violated the collective bargaining agreement, that the employees not covered by the program suffered no monetary loss, and that the Company was not liable for punitive damages, but that the non-participating employees were entitled to compensation under the Non-Discrimination paragraph of the collective bargaining contract. The Company sought to have that damage portion of the award vacated by the district court.

The Arbitration Board held that the Company had violated the Non-Discrimination and Wage Rates provisions at Paragraphs 69 and 50-51 of the Agreement. Paragraph 69 provides:

> The Company and the Union... agree that the provisions of this Agreement shall continue to apply to all employees covered by this Agreement without discrimination and that in carrying out the respective obligations under this Agreement there will be no discrimination against any qualified employee or applicant on account of race, creed, color, sex, age (40 and over), national origin, handicap or status as a veteran.

Paragraph 50 states: "For all employees of the Company covered by this Agreement, wages at the rates shown in Exhibit 'A'... shall be the base rates paid for 40 hours work per work week." Paragraph 51 deals with wage rates for all employees covered by the Agreement who are on a monthly rate of pay.

The district court disagreed with the Arbitrators' interpretation of the non-discrimination paragraph of the contract, but thought itself bound by the Arbitrators' interpretation of the non-discrimination provision. "The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *United Paperworkers Int'l Union v. Misco, Inc*, 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987). This is true even if the court is convinced that the arbitrator has committed serious error.

Nevertheless, the district court held that the damages awarded were in fact punitive damages, not compensatory, and vacated the award, following the Arbitrators' own decision that punitive damages were not warranted under the facts of the case.

[1, 2] A careful review of the district court's well-crafted 22-page ORDER, that sets forth in detail the arbitration and the history of this litigation, reveals that it is due to be affirmed. *Georgia Power Co. v. Int'l Bhd. of Elec. Workers, Local*

84,____F.Supp_____ ,1992 WL 210987 (N.D.Ga. June 4, 1992) [No. 1:91-cv-15-ODE]. The court followed the correct standard for considering such a case, a standard that is equally applicable to our de novo review of the district court's order. In a summary judgment ruling we review de novo the district court's determination and apply the same legal standards that bound the district court. *Bruno's, Inc. v. United Food & Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529, 1531 (11th Cir.1988). Substantive review of the arbitration award "is limited to a determination of whether [the] award is irrational, whether it fails to draw its essence from the collective bargaining agreement or whether it exceeds the scope of the arbitrator's authority." *Butterkrust Bakeries v. Bakery Workers Int'l Union, Local No. 361*, 726 F.2d 698, 699 (11th Cir.1984).

[3] We affirm the decision of the district court that the damages awarded by the Arbitration Board are punitive in nature, for the reasons stated in that ORDER. An arbitrator's denomination of an award as compensatory will not prevent the court from determining that the award is in fact punitive. *Baltimore Regional Joint Bd. v. Webster Clothes*, 596 F.2d 95, 98 (4th Cir. 1979); *Westinghouse Elec. Corp., Aerospace Div. v. IBEW Local 1805*, 561 F.2d 521, 523-24 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036, 98 S.Ct 771, 54 L.Ed.2d 783 (1978).

[4,5] The Arbitrators' own findings reveal that the damages awarded in fact were punitive. For the damage award to be validly compensatory, there must be a causal

relationship between the Company's breach of the Agreement on the loss claimed by the Union. *Desert Palace, Inc, v. Local Joint Executive Bd. of Las Vegas*, 679 F.2d 789, 794 (9th Cir.1982); *Baltimore Regional Joint Bd. v. Webster Clothes*, 596 F.2d 95, 98 (4th Cir 1979). The Board made no finding that the non-participating employees lost anything by reason of the Company's violation. The Board's findings did not address whether Georgia Power would have implemented the incentive program company-wide without the initial pilot program. There were no findings concerning the bonuses the non-participating employees would have received had they been allowed to participate in the program. In the absence of any findings concerning the position in which the non-participating employees would have been had the Company not violated the Agreement, the Arbitration Board has failed to find any causal relationship between the Company's breach and the Union's loss. No basis exists for the Arbitrators' conclusion that the Company's violation of the Non-Discrimination provision caused non-participating employees to suffer a monetary loss of any sort traditionally justifying an award of compensatory damages. The monetary relief ordered by the Arbitration Board must be considered punitive.

[6] The Union alternatively argues that even if the award is punitive, it should be enforced because an award of punitive damages draws its essence from the collective bargaining agreement. The Union cites to case law from this

circuit concluding that an arbitrator has authority to award punitive damages unless the Agreement specifically prohibits the award of such damages. *See*

Bonar v. Dean Witter Reynolds, Inc, 835 F.2d 1378, 1386-87 (11th Cir.1988); *Willoughby Roofing & Supply Co. v. Kajima Int'l*, 598 F.Supp. 353 (N.D.Ala.1984), *aff'd*, 776 F.2d 269 (11th Cir.1985). This general authority to award punitive damages is irrelevant, however, in light of the Arbitrators' finding that punitive damages were not warranted under the facts of this case.

During the course of the arbitration proceedings, the Union consistently argued that the Company had acted in bad faith and urged the Arbitrators to award punitive damages. Initially the Arbitrators rejected the Union's position in a Tentative Opinion, stating:

> The evidence has not established... that the company in implementing the Pilot Incentive Pay Program acted wilfully or wantonly. The implementation occurred only after the Company had determined that it had negotiated in good faith with the Union to impasse. While the acts of the Company may not have constituted negotiation, or may have even been surface bargaining, the evidence has not established any willful or wanton conduct on the part of the Company in connection with the Pilot Incentive Pay Program.

This finding was reaffirmed in both an Addendum and in the Final Opinion. Even if authority existed for punitive

damages, the Arbitrators' own findings foreclose any argument that a punitive damage award was warranted in this case.

AFFIRMED.[1]

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[1] Carried with the case is the Appellee's Motion to Strike Portions of Appellant's Reply Brief and Appendices. That motion is denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 28 1993
MIGUEL J. CORTEZ
CLERK

No. 92-8584

GEORGIA POWER COMPANY,

Plaintiff, Counter-Defendant, Apellee,

versus

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 84,
an unincorporated association,

Defendant, Counter-Claimant, Appellant.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITIONS(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: BLACK and CARNES, Circuit Judges, and RONEY,
Senior Circuit Judge.

PER CURIAM:

(✔) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 84,
Petitioner,
v.
GEORGIA POWER COMPANY,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an Arbitrator's monetary award which did not compensate employees for any economic loss may be upheld, even though the Arbitrator specifically found that punitive damages were not warranted.

II. Whether a party seeking vacation of an arbitration award can be considered to have abandoned a defense that punitive damages are improper when it pressed that defense continuously in arbitration proceedings.

III. Where a court holds that an Arbitrator's award of monetary damages (in the absence of actual economic loss) violates his own findings that punitive damages are not necessary, whether such a holding constitutes a finding of a "mistake of law" by the Arbitrator that would preclude vacation of the award.

IV. Whether this Court should exercise its discretion to review a fact-specific decision of the Eleventh Circuit Court of Appeals which simply relied on the Arbitrator's own findings of fact and rationale and applied existing and controlling law.

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CITATIONS OF REPORTED OPINIONS IN THE COURTS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 995 F.2d 1030 (1993). The decision and Order of the United States District Court for the Northern District of Georgia is reported at 825 F. Supp. 1023 (1992).

No. 93-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 84,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Introduction

Georgia Power Company[1] (hereafter "Company") is engaged in the generation, transmission and distribution of electricity, serving over 95 percent of the counties in the State of Georgia. Effective July 1, 1987, the Company and Petitioner International Brotherhood of Electrical Workers, Local 84 ("Union") executed a collective bargaining agreement entitled "Memorandum of Agreement between Georgia Power Company and Local Union No. 84 of the International Brotherhood of

[1] In accordance with Supreme Court Rule 29.1, Georgia Power Company's parent company is The Southern Company.

Electrical Workers" ("Collective Bargaining Agreement" or "Agreement"). This Agreement was in force during all times material to this action, and covered approximately 6,000 employees in a statewide bargaining unit. Paragraph 65 of the Agreement provided for arbitration of certain disputes between the Company and the Union. 825 F. Supp. 1023, 1024 (N.D. Ga. 1992). That paragraph provided that the "Arbitration Board shall not interpret this Agreement in any manner so as to amend or supplement this Agreement." The Agreement also provided expressly for backpay remedies, but made no provision for punitive damages. (Complaint, Exh. A).[2]

Statement of Facts

During the first six months of 1988, the Company and the Union conducted negotiations regarding the Company's proposed implementation of a Pilot Team Incentive Program ("Program"), an incentive pay program designed to increase operating efficiency and performance. The Program proposed by the Company was to operate on a trial basis at two locations, thereby including only a portion of the bargaining unit. The Union refused to agree to any incentive pay program which did not cover the entire bargaining unit, or which did not spread the bonuses earned by some employees to all the unit's employees. Due to the pilot nature of the Program, and the significant risks created, a trial period in select locations was an absolute prerequisite for the Company to any future inclusion of the entire bargaining unit.

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[2] Respondent cites to the record as follows:

1) The reported opinions of the Eleventh Circuit and District Court listed on page vii herein,

2) The Stipulation of Record filed in the District Court on August 20, 1991 in which both parties agreed that the documents attached thereto were true and correct copies and would be admitted into evidence before the Court to be considered by the Court in reviewing any and all dispositive motions,

3) The initial Complaint filed in the District Court by the Respondent herein on January 4, 1991.

825 F. Supp. at 1028. Moreover, spreading any bonus monies from the Program participants to non-participants would have negated the incentive effort of the Program, thereby defeating the whole purpose of the Program and rendering the test program meaningless. (Stipulation of Record, Exh. A, pp. 146, 170, 221).

Following an impasse in negotiations, the Company in good faith unilaterally implemented the proposed Program for employees at its Plant Bowen and in its Macon Division. 825 F. Supp. at 1024.[3] In August 1988, the Union filed a grievance regarding the Company's implementation of the Program. The Company denied this grievance, and pursuant to Paragraph 65 of the Agreement, the parties submitted their dispute to arbitration. The Arbitration Board was composed of a Company arbitrator, a Union arbitrator, and Ferrin Y. Mathews, a neutral arbitrator selected by agreement of the parties. *Id.* at 1024, 1025.

By the end of 1988, annual bonuses in excess of 14 percent were earned for all employees at Plant Bowen due to increased savings in plant operations. In the Macon Division, however, bonuses of less than two percent were earned. In early 1989, the bonuses for 1988 were paid out, and the Union publicly encouraged its members to accept payment, which they did. The Program continued through 1989 at both locations.

The Arbitration Board held an evidentiary hearing regarding the parties' dispute on September 16, 1989. At the hearing and in post-hearing briefs, the Union requested that the Arbitrator award the same percentage of bonus pay earned by the Plant Bowen employees to all the non-participating bargaining unit employees. The Company responded that such an award would constitute punitive damages, and was not permissible under the Agreement. (Stipulation of Record, Exh. E-28).

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[3] Under the Program, the Company paid employees at Plant Bowen and in the Macon Division fifty percent of the savings they generated. The savings generated were measured according to formulas developed by the Company that were specific to each location. *Id.*

On February 7, 1990, Arbitrator Mathews issued a Tentative Opinion and Award, which at the time was neither a final decision of the Arbitration Board nor a binding award. In the Tentative Opinion and Award, Arbitrator Mathews found that the Company's implementation of the Program violated the collective bargaining agreement. 825 F. Supp. at 1025. Mathews first determined that the cash awards the Company had paid out under the Program constituted "wages" and "rates of pay," which are mandatory subjects of bargaining under the Agreement. *Id.* He further found that these cash awards altered the wage schedules which had been negotiated by the Company and the Union. *Id.* Mathews thus concluded that the Company had violated the Agreement by altering the negotiated wage schedules without the consent of the Union. *Id.*

Arbitrator Mathews, however, rejected the Union's request that he award "the same percentage of wages, as that which was paid to the employees at Plant Bowen, to all of the Company's employees system-wide." *Id.* Arbitrator Mathews concluded that no basis existed to support an award of monetary damages:

> As also contended by the Company, no employee of the Bargaining Unit has suffered a monetary loss. For the year 1988, the Company paid to the participating employees that amount due them under the Program. The remaining members of the Bargaining Unit did not participate in the Pilot Incentive Pay Program, and hence were promised nothing by the Company. Since it has been found that the action of the Company in implementing the Program was wrongful, the employees, at locations other than Plant Bowen and the Macon Division, would have no legal basis to compel any payment from the Company.

Id. In so holding, the Arbitrator also explicitly found that (1) the Program had been successful and the participating employees worked "harder and smarter," (2) the participants had earned

their bonuses, and (3) the Company had acted in good faith in implementing the Program. Mathews found that the issuance of an award to employees who did not participate in the Program would be "in the nature of a penalty, and would not 'make whole' employees for a monetary loss suffered." *Id.* The Tentative Award did not order the Company to cease further bonus payments owed for results already achieved.

On February 12, 1990, the Arbitration Board held an executive session. At that session, the Company Arbitrator informed the Board that immediately before receipt of the Tentative Opinion and Award, Georgia Power had begun making payments under the Program for the year 1989. *Id.* The Union arbitrator argued that these payments were undertaken in bad faith and once again urged Arbitrator Mathews to require the Company to pay monetary damages. However, the Union did not ask that the payments be stopped, and the Union encouraged its members to accept the payments. (Stipulation of Record, Exh. D-1, p.3) Arbitrator Mathews then ordered further briefing on the question of whether Union members who did not participate in the Program were entitled to monetary relief. On March 8, 1990, the parties submitted briefs on that issue.

On April 27, 1990, Arbitrator Mathews issued a Reconsideration of and Addendum to Opinion and Award Rendered February 7, 1990 ("Addendum"). In this Addendum, Arbitrator Mathews concluded that the Company should be required to pay monetary damages to Union members who did not participate in the Program. He ordered the following remedy:

> The Company is ordered to immediately determine the amount of money paid to the Bargaining Unit employees participating in the Incentive Pay Program for the years 1988 and 1989 at Plant Bowen and in the Macon Division. That amount, so determined shall constitute the amount of money which the Company shall immediately pay to the Bargaining Unit employees who did not participate in the

> Incentive Pay Program. The payment to said employees shall be by the same method and on the same method utilized by the Company in making the payment to the Bargaining Unit employees at Plant Bowen and in the Macon Division.

825 F. Supp. at 1025, 1026.

Arbitrator Mathews adhered to his original conclusion that "no employee of the Bargaining Unit, not a part of the Program, has suffered a monetary loss as that employee had not been promised anything by the Company." *Id.* at 1026. Moreover, he again found no bad faith by the Company in implementing the Program or making the payments. However, upon reconsideration, he concluded that those employees "may have suffered monetary loss on another basis." *Id.* Arbitrator Mathews reached this conclusion on the basis of Paragraph 69 of the Agreement, entitled "Non-Discrimination," and Paragraph 50 of the Agreement, entitled "Wage Rates." *Id.* Arbitrator Mathews found that the Company had violated Paragraph 69 by altering the wage of selected employees, i.e., the non-participants in the Program. *Id.*

Since Paragraph 69 had never been the subject of the prior testimony and briefing, nor been placed at issue, by letter dated May 2, 1990, the Company Arbitrator requested an executive session of the Arbitration Board. (Stipulation of Record, Exh. R, pp. 2-3). On June 18, 1990, the Arbitration Board held a hearing regarding the scope and meaning of Paragraph 69. The Company argued that the provision applies only to discrimination "on account of race, creed, color, sex, age (40 and over), national origin, handicap or status as a veteran," and no evidence was presented to the contrary. On October 8, 1990, Arbitrator Mathews issued an opinion in which he declined to modify the remedy he had ordered, although the only evidence presented established that the exclusive intent of Paragraph 69 had been to prohibit trait-based discrimination (e.g. race, age, sex). (Stipulation of Record, Exh. R, pp. 4-6). The Union Arbitrator concurred in this opinion, thereby making it a final and binding decision of

the Arbitration Board. 825 F. Supp. at 1026. The Arbitrator's Award ordered the Company to pay approximately $2.7 million to all of the bargaining unit employees who did not participate in the Program. (Stipulation of Record, Exh. R., p. 20).

Court Proceedings Below

On January 4, 1991, Georgia Power filed a complaint under 29 U.S.C. § 185 seeking to vacate that portion of the arbitration award which requires it to pay monetary damages to Union employees who did not participate in the Pilot Incentive Pay Program. The Company advanced four primary bases for vacation of the award: (1) the monetary remedy ordered by the Arbitration Board constitutes an unauthorized award of punitive damages; (2) the award conflicts with the Collective Bargaining Agreement because it exceeds the Arbitration Board's authority to award back pay and because the award itself violates the wage schedules set forth in the Agreement; (3) no evidence exists to support the Arbitrator's construction of Paragraph 69 of the Agreement; and (4) the award is irrational. 825 F. Supp. at 1026, 1027.

On June 4, 1992, the District Court entered an Order vacating the damages portion of the Award, finding that the $2.7 million constitutes impermissible punitive damages. The District Court chose not to address the other grounds for vacating the Award. 825 F. Supp. 1023. On July 16, 1993, the Eleventh Circuit issued an opinion affirming the decision of the District Court, and noting that an Arbitrator's denomination of an award as compensatory will not prevent the court from determining that the award is in fact punitive. 995 F.2d 1030, 1032 (11th Cir. 1993).

SUMMARY OF ARGUMENT

The Eleventh Circuit properly affirmed the District Court's order vacating the $2.7 million award in issue because it conflicted with the Arbitrator's findings and failed to draw its essence from the collective bargaining agreement in issue. The Union's Petition for Writ of Certiorari seeks to concoct a split in the Circuits and a

conflict with Supreme Court precedent which does not exist. First, the Union argues that the Eleventh Circuit's decision is contrary to established authority concerning the standard necessary to permit the awardance of punitive damages by an Arbitrator. The Eleventh Circuit properly found irrelevant or inapplicable the cases now relied upon by the Union, because in this matter the Arbitrator himself found that *punitive damages were not appropriate.* Hence, the validity of his award depended upon the Union's ability to establish that the damages were actually compensatory rather than punitive in nature. The Union failed to show a causal relationship between the breach of the Agreement and the claimed loss, a prerequisite to establishing compensatory damages.

Second, the Union has asserted that the Eleventh Circuit's opinion conflicts with the standards established by other circuits concerning waiver of an argument by a party at the arbitration level. Again, the cases relied upon by the Union are distinguishable from the instant matter, because the Company *never* acquiesced in the awardance of any damages that were punitive in nature. The Union's assertion that the Company's only position at the June 18, 1990 hearing addressed the meaning and effect of the non-discrimination clause of the Agreement disregards the fact that, at the time of that hearing, the Arbitrator had already found in the Company's favor on that issue — by deciding that punitive damages were not warranted.

Finally, the Union's argument that the Eleventh Circuit's opinion conflicts with Supreme Court jurisprudence is misplaced. The District Court (and the Eleventh Circuit) properly found that the Arbitrator's award did not draw its essence from the collective bargaining agreement, because the money damages were not compensatory, and because he found that punitive damages were not warranted under the circumstances.

REASONS FOR DENYING THE WRIT

I. PURPORTEDLY CONFLICTING CASE LAW CONCERNING THE STANDARD NECESSARY TO AWARD PUNITIVE DAMAGES IN A LABOR ARBITRATION IS IRRELEVANT, BECAUSE THE ARBITRATOR IN THIS CASE FOUND THAT PUNITIVE DAMAGES WERE NOT WARRANTED.

The Union has failed to identify a split in the jurisprudence of the various Circuit Courts that is *relevant to the outcome of this matter*. All of the cases that the Union cites concerning purportedly varying Circuit Court standards on permitting punitive damages either involved statutory damages or contracts with broad remedy clauses, involved findings of bad faith or fraud, or involved nominal or small awards to compensate a union for its costs. In contrast, in the instant matter, Arbitrator Mathews found repeatedly that the Company had not engaged in the bad faith or willful or wanton conduct otherwise necessary for punitive damages, and that punitive damages were not appropriate. 995 F.2d at 1032. The Arbitrator's refusal to award punitive damages clearly "draws its essence" from the Agreement, which only provides for backpay. This refusal should not be overturned because of the absence of legal support for punitive damages in the collective bargaining context.

The Union does not dispute that in the context of labor arbitration, "[g]enerally, the remedy for breach of a collective bargaining agreement is limited to an award of compensatory damages . . . . [T]o be compensatory, there must be a causal relationship between the Company's violation and the loss claimed by the employee . . . . An award that exceeds the monetary loss which an injured party suffered as a result of an agreement breach is considered punitive." *Howard P. Foley Co. v. Int. Bro. of Elec. Workers,* 789 F.2d 1421, 1423 (9th Cir. 1986), following *Desert Palace v. Local Joint Executive Board of Las Vegas,* 679 F.2d 789, 794 (9th Cir. 1982); *Westinghouse Electric Corp., Aerospace Division v. Int. Bro. of Elec. Workers Local 1805,* 561 F.2d 521, 523-24

(4th Cir. 1977), *cert. denied,* 434 U.S. 1026 (1978). As the courts below found, Arbitrator Mathews made no findings as to what the position of the non-participating employees would have been in the absence of a violation, omitting an essential element of any compensatory award, and his opinion "fail[ed] to establish a causal relationship between the Company's violation of the Agreement and any monetary loss on the part of employees who did not participate in the Pilot Incentive Pay Program." 825 F. Supp. at 1028.

This distinction between compensatory and punitive damages is well-grounded in national labor policy and Supreme Court precedent. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198, 61 S.Ct. 845, 854 (1941) ("only actual losses should be made good"). The policies of the National Labor Relations Act ("NLRA") are "essentially remedial." *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 10, 61 S.Ct., 77, 78-79 (1940). "The Board's task is to craft an order, and an appellate court will ordinarily enforce it, unless the order is viewed as penal or confiscatory." *Manhattan Eye Ear & Throat Hosp. v. NLRB,* 942 F.2d 151, 156-57 (2d Cir. 1991); *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 67 (2d Cir. 1979). Under the NLRA, a "remedy must be sufficiently tailored to expunge only the *actual,* and not merely *speculative* consequences of the unfair labor practices." *Sure-Tan v. NLRB,* 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) (emphasis in original).

As the courts below held and the Union does not dispute, (1) the Arbitrator failed to address what position the non-participants would have been in the absence of the Company's violation of the Agreement, (2) the Arbitrator failed to find the Program would have been implemented Company-wide under any circumstances, (3) the Arbitrator failed to find the Company would have implemented the Program Company-wide without first conducting the pilot, and (4) the Arbitrator failed to include a finding of a Company-wide incentive pay program absent the pilot in order to establish causation. As the lower courts found, in the absence of these critical findings, the award could only be punitive in nature. 825 F. Supp. at 1028-1030.

In the face of such findings of fact by the Arbitrator and well-established case law, the Union's case has repeatedly rested on wholly irrelevant and disparate decisions.

In *Hygrade Operators v. Local 333,* 945 F.2d 18 (2d Cir. 1991), which involved an illegal lockout by the employer, the contract gave the arbitrator "full authority . . . to fashion any appropriate remedy." *Id.* at 20-26. The union sought $100,000 and an apology for the "injured feelings" of the locked out employees. *Id.* at 21. No evidence of monetary damages was produced, and the arbitrator decided not to award any such damages. However, he awarded $50,000 to compensate the union for expenses incurred by the union in being forced to strike due to the lockout. The arbitrator noted that the amount represented only a fraction of the union's costs incurred. *Id.* at 21.

The court of appeals upheld the award despite the absence of evidence of monetary damages, finding that under the broad remedy clause,

> [t]he arbitrator was nonetheless entitled to conclude that the employer's preemptive lockout weakened the union's bargaining position both at the juncture of the on-going labor controversy and in the aftermath, with resulting economic damage to the union, and to approximate the damages as the circumstances allowed.

Id. at 24.

The distinctions are apparent. *First,* unlike the relevant contract provisions in the instant matter, a contractual provision explicitly allowed any remedy. *Second,* the court viewed the award as compensatory based on expenses, and, *again,* it was paid to the union, rather than the employees as compensation. *Third,* the award was small and only a fraction of the possible amount, and not a speculative amount of several million dollars. *Fourth,* the court noted that the breach had been economically motivated to

rob the union of its right to strike. *Id.* at 24. The Union here made no assertion of anti-union animus.

The Sixth Circuit's decision in *Eberhard Foods, Inc. v. Jerome Handy,* 868 F.2d 890, 892-93 (6th Cir. 1989), is equally inapplicable to this case. It involved a discharge case where the arbitrator reinstated the employee without back pay and the court simply upheld the right of arbitrators to fashion reinstatement remedies when just cause for discharge did not exist. The case does not speak to the facts of the instant matter, particularly since the Arbitrator specifically found that punitive damages were not appropriate and there was no authority to move beyond a back pay award.

In *Goss-Golden West Sheet Metal, Inc. v. Sheet Metal Workers Int'l Local 104,* 933 F.2d 759 (9th Cir. 1991), a joint employer-union association arbitration board decided grievances where the employer had hired an employee outside of the hiring hall and did not make the proper benefit contributions to trust funds, and the employer paid the wrong wage rate on 14 commercial building projects. The employer board members, along with the union members, voted unanimously against the employer, and awarded $70,000.

The employer contended the award requiring that benefits and back wages be paid was punitive. The court noted most of the award was compensatory, but held that even if punitive, the contract's language gave the board the authority to award punitive damages. The clause read that the arbitration panel is "empowered to . . . grant such relief . . . as [it] deem[s] necessary and proper, including awards of damages or other compensation." *Id.* at 764. Again, this case is distinguishable alone by the presence of an explicit remedy clause, which is not present in the instant matter. In addition, there was only a small award, versus the multi-million dollar award at issue here.

Finally, the Union's reliance on *Int'l Bhd. of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 117, v. Washington Employers, Inc.,* 557 F.2d 1345, 1349-50 (9th Cir.

1977), is particularly mystifying. The parties specifically asked the arbitrator to consider the appropriate statutory damages under state law, and then sought review based upon what they contended was his erroneous application of that law. The case never addressed the issue of punitive damages. Here, Georgia Power argued vehemently that punitive damages were not appropriate, while the Union argued that they were. The Arbitrator agreed with Georgia Power on that issue.

It is significant that the Union has elected not to continue to rely on the Eleventh Circuit's decision in *Willoughby Roofing and Supply v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), aff'd on the basis of the district court's opinion, 776 F.2d 269 (11th Cir. 1985). The Union relied on *Willoughby* extensively below, but both the District Court and the Court of Appeals found the decision unsupportive of the Union's claim that punitive damages were authorized under the Agreement. The reason for the Union's abandonment of *Willoughby* is clear: It represents controlling Eleventh Circuit precedent which is entirely consistent with the relevant holdings of other Circuits, and supportive of the Eleventh Circuit's holding below.

The Union first relied on *Willoughby* in arguing that the Eleventh Circuit allows punitive damages awards when the Agreement does not explicitly prohibit them. *Willoughby* was a construction arbitration case where the plaintiff sought compensatory and punitive damages for breach of contract and fraud arising from a roofing job. The contract had an arbitration clause which did not address remedies, but which applied the American Arbitration Association ("AAA") Construction Arbitration Rules. Rule 43 of the AAA Rules authorizes an arbitrator to "grant *any remedy or relief* which is just and equitable." *Willoughby*, 598 F. Supp. at 355-56 (emphasis added). Based on AAA Rule 43, and distinguishing the labor arbitration precedent in *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979) (punitive damages prohibited where no evidence breach of agreement caused monetary loss to union employees), the district court

found that the contract authorized the award of punitive damages. *Willoughby,* 598 F. Supp. at 357.

The district court in *Willoughby* made two important distinctions from *Webster Clothes. First,* it held that *Willoughby* is controlled by the Federal Arbitration Act, as opposed to labor arbitration rules. *Second,* the court stated that *Webster Clothes* had not "actually involved factual findings or allegations sufficient to support the award of punitive damages under applicable substantive law. The case *sub judice* is decidedly different in this respect." *Id.* at 358 n.9.

Thus, the central distinctions here are that *Willoughby* (1) was a construction arbitration case controlled by specific AAA rules which authorized "any remedy," (2) involved factual findings of fraud upon which the punitive award was based, and (3) the court explicitly distinguished its ruling from labor arbitrations where, such as here, no finding of fraud or bad faith conduct exist.

The Eleventh Circuit affirmed on appeal but made the following findings. *First,* the punitive damages were awarded for willful fraud. *Willoughby,* 776 F.2d at 270. *Second,* the Court stated that "punitive damages . . . may not be recovered for pure breach of contract at any rate." *Id.* at 270 n.1. Here, all Arbitrator Mathews found was that the Company simply breached the contract. *Willoughby* fully supports the Arbitrator's initial action in refraining from awarding punitive damages and the Eleventh Circuit's refusal to resurrect the Union's claim for punitive damages. As a result, the Union here has made no showing that either *Willoughby,* the decision below, or any other Eleventh Circuit ruling on punitive damages is in clear conflict with any other Circuit's holding.

Because none of the cases relied upon by the Union are applicable to the instant matter, the Union has failed to identify a split in the Circuits on the issue of whether or not a punitive damage award was proper. Moreover, as noted above, Arbitrator Mathews in this matter specifically held that punitive damages were not appropriate in this matter, because he did not find the

bad faith or wanton or willful misconduct that he interpreted would be necessary in order to support a punitive damages award. 995 F.2d at 1032; 825 F. Supp. at 1031. In sum, the case law in and out of the Eleventh Circuit consistently holds that in the labor arbitration context, absent either an explicit provision for punitive damages, or a finding of willful or bad faith misconduct, the granting of punitive damages is prohibited. Accordingly, there is no basis for granting the Petition in the instant matter.

II. THERE IS NO RELEVANT CONFLICT IN THE CIRCUITS CONCERNING AN EMPLOYER'S WAIVER OF A DEFENSE IN AN ARBITRATION, BECAUSE GEORGIA POWER AT NO TIME WAIVED ANY OF THE DEFENSES WHICH IT URGED IN THE DISTRICT COURT AND THE ELEVENTH CIRCUIT.

In arguing that the Company waived any argument that the monetary award granted by Arbitrator Mathews was improper, the Union grossly misrepresents the record. Contrary to the Union's assertion, from the very first post-hearing brief and throughout the arbitration, the Company challenged the permissibility of any monetary award, because any such award would be punitive in nature. The Company's opposition to any such award was recognized by the Arbitrator in his second opinion. (Stipulation of Record, Exh. L, p. 10). He further acknowledged the Company's position that "[a]ny monetary award in the case would be punitive because the union had not shown that any bargaining unit member had suffered any monetary or other loss as a result of the Incentive Program." *Id.*, p. 12. The Arbitrator also retained his finding that punitive damages were not appropriate in his opinion making a monetary award: "The Arbitrator rejected that argument of the Union [punitive damages]on page 58 of the tentative opinion and award, and, upon reconsideration, adheres to the original determination." *Id.*, p. 16).

Moreover, at the Paragraph 69 hearing held on June 18, 1990, the Arbitrator would not allow the remedy issue to be framed, and cut the Company off when it attempted to state the issue. Prior to being cut-off, the Company stated that the remedies

available to the Arbitrator did not include punitive damages. (Stipulation of Record, Exh. M, pp. 8-9).

The Arbitrator also had no difficulty understanding that he was not "empowered" to act beyond providing compensatory relief *consistent with the agreement,* as is shown by the recitation at the conclusion of his final opinion:

> The second tentative award, making a monetary award of damages, draws its essence from the Contract, and while the Company may disagree with the Impartial Chairman's finding of fact and application of the meaning of the provisions of the Agreement, the compensatory award to those employees discriminated against is based upon the content and meaning of the provisions of the Agreement.

(Stipulation of Record, Exh. R, p. 20). There is no basis in the record to support the Union's notion that the Arbitrator was at any time empowered to reach beyond the Agreement to formulate an award based on his personal notions of industrial justice, and the Arbitrator obviously did not interpret the submission as so empowering him. Indeed, the Union does not dispute that the parties had no past practice or prior recognition of the allowance of punitive damages, nor does the Union dispute, as the District Court held, that the Agreement specifies only back pay and reinstatement as permissible remedies.

The Union's citation to cases to support their submission and waiver argument is as flawed as their use of the record in this regard. It is axiomatic that when parties engage in a generic framing of an issue in arbitration, parties do not submit to a remedy that would "be contrary to the basic labor-management relations agreement between the parties." *Local 1837, Intern. Broth. v. Maine Public Service Co.,* 579 F. Supp. 744, 753 (D. Me. 1984). Failing to recognize this premise, the Union is unable to support

its position with relevant authority.[4] Moreover, there can be no waiver without a party's explicit agreement to waive a defense or the party's repeated unwillingness to assert the defense. Here, where the record shows without dispute an on-going pattern of both the Company and the Arbitrator recognizing and asserting the impermissibility of punitive damages, the argument of waiver is frivolous at best. Indeed, the Union's own cases support such a conclusion.

In *Capital City Tel. Co. v. Communication Wkrs.,* 575 F.2d 655 (8th Cir. 1978), the employer sought money damages and injunctive relief against the union for violating a no-strike clause. The district court referred the case to arbitration. The arbitrator found a contract violation but denied damages. The employee appealed, contending the damage issue should have gone to a trial before the district court.

The court found first that the parties had specifically stipulated to have the damage issue decided by the arbitrator, and second the employer had never challenged the arbitrator's right to decide the damage issue until it lost. *Id.* at 658. In the present case, the Company challenged the right to award punitive damages from the start. Moreover, in *Capital City,* the Union also cites to two Seventh Circuit subcontracting decisions, *Jones Dairy Farm v. Local No. P-1236,* 760 F.2d 173 (7th Cir. 1985), and *Dreis & Krump Mfg. v. IAM,* 802 F.2d 247 (7th Cir. 1986). Again, these cases are totally inapplicable. In *Dreis & Krump,* 802 F.2d 247, the arbitrator ordered the cancelling of subcontracting decisions which violated the contract (as conceded by the employer) and ordered back pay.

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[4] The Union's misstatements throughout this litigation and bargaining history seeks to obscure the public policy implications of affirming awards such as this. In the context of labor arbitration "[P]unitive actions are disfavored; the award of punitive damages in the midst of a steady stream of arbitrations between a company and its unions might well undercut both sides 'confidence in the arbitration process and decrease their commitment to this essential aspect of industrial self-government.' " *Raytheon Co. v. Automated Business Systems, Inc.,* 882 F.2d 6, 10 (1st Cir. 1989), *quoting United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 580, 80 S. Ct. 1347, 1351 (1960).

The Company never protested or challenged the submission of the subcontracting issue. *Id.* at 252. In *Jones Dairy Farm,* the arbitrator simply forbade the employer the right to contract out janitorial work based on his interpretation of an NLRB decision. *Jones Dairy Farm,* 760 F.2d at 174-75. There was no issue of punitive damages, and the employer had explicitly agreed to submit the contracting issue. *Id.* at 175-76.

In the Eleventh Circuit, "the law is well-established that an arbitrator 'can bind the parties only on issues that they have agreed to submit to him.' " *Butterkrust Bakeries v. Bakery, Conf. & Tobacco Workers,* 726 F.2d 698, 700 (11th Cir. 1984), quoting from *Piggly Wiggly Ops. W'house, Inc. v. Piggly Wiggly Ops. W'house Ind. Truck Driver's Union,* 611 F.2d 580, 583 (5th Cir. 1980). Where an arbitrator decides an issue which was not submitted to him, the arbitrator's decision exceeds the scope of his authority and is unenforceable. *Metro Chevrolet v. Union de Tronquistas,* 835 F.2d 3, 5 (1st Cir. 1987); *St. Louis Theat. Co. v. St. Louis Theat Bhd.,* 715 F.2d 405, 409 (8th Cir. 1983); *Aeronautical Mach. Lodge 709 v. Lockheed-Georgia,* 521 F. Supp. 1327, 1329 (N.D. Ga. 1981). In the present matter, it is clear that (1) the issue of punitive damages was never submitted to the Arbitrator; (2) the Company repeatedly and in a timely manner denied the availability of a punitive damages remedy; (3) the Arbitrator explicitly denied the availability of a punitive damages remedy; and (4) the case law in and out of the Eleventh Circuit supports a finding that no explicit or applied waiver of the defense could have taken place here. Since the Union cannot show relevant authority to support a waiver, the Petition should be denied.

III. THE ELEVENTH CIRCUIT'S OPINION IS NOT BASED IMPROPERLY ON A FINDING OF A MISTAKE OF LAW BY THE ARBITRATOR.

The Union's contention that the Arbitrator simply made a mistake of law, which is not subject to judicial review is untenable, and grossly misrepresents the basis of the District Court's and Court of Appeals' decisions. Contrary to the Union's assertion, there exists no Supreme Court precedent which conflicts with the

opinions below. The general rule of deference to arbitration awards applies only when the arbitrator is acting pursuant to the terms of the collective bargaining agreement. The powers of an arbitrator are not unlimited, and he is bound by the terms of the contract from which he claims his authority. *Monongahela Power Co. v. Local No. 2332,* 566 F.2d 1196, 1198 (4th Cir. 1976). As the Supreme Court held in *United Steelworkers of Am. v. Enterprise Wheel & Car Co.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960), the arbitrator does not sit "to dispense his own brand of industrial justice . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." The effect of *Enterprise Wheel* and its progeny, particularly in the Eleventh Circuit, is that when an arbitrator's award violates or conflicts with the terms of the bargaining agreement, constitutes a ruling beyond the scope of the arbitrator's authority, or is irrational or arbitrary, that award is to be vacated. *Bruno's, Inc. v. United Food & Comm. Wkrs.,* 858 F.2d 1529, 1531 (11th Cir. 1988).

The Eleventh Circuit affirmed the vacation of the award here not on the basis of mistake of law, since even the Arbitrator acknowledged the unavailability of punitive damages. Rather, the award was vacated solely on the basis of the Arbitrator's own findings of fact and conclusions of law. It was the Arbitrator's inexplicable failure to align the award with his own findings which warranted vacating the award.

The fundamental and most disturbing irrationalities of the award are that the Arbitrator found (1) no basis, either in the Agreement or in the Company's conduct, to award punitive damages; (2) the non-participants suffered no compensable loss; (3) no basis that the non-participants would have ever participated in the Program; and (4) the participants earned their incentive pay. An award which is unenforceable in reason and fact manifests an infidelity to the arbitrator's obligation to frame an award which draws its essence from the bargaining agreement. *Washington Hosp. Center v. Service Employees Intern.,* 746 F.2d

1503, 1514 n.13 (D.C. Cir. 1984); *Intern. Ass'n. of Machinists, Etc. v. Modern Air Transp. Inc.*, 495 F.2d 1241, 1244 (5th Cir. 1974).

As the Eleventh Circuit held here, once the Arbitrator found no basis for punitive damages, his own findings of fact foreclosed the awarding of any such damages. 995 F.2d 1030. *Enterprise Wheel* and its progeny stand for the proposition that an arbitrator need not explain his rationale and that any ambiguity be resolved in favor of confirmation of the award. *Enterprise Wheel,* does not however, authorize the confirmation of an award where, as here, the Arbitrator does provide the underlying rationale and such rationale indicates a disregard for the Arbitrator's own findings of facts. *U.S. Postal Serv. v. Nat. Ass'n. of Letter Carriers,* 847 F.2d 775, 778 (11th Cir. 1988); *Teamsters, Local 814 v. Sotheby's, Inc.,* 665 F. Supp. 1089, 1094 (S.D. N.Y. 1987). As the District Court held below, once the Arbitrator made formalized findings and offered reasons for his decision, the court could properly consider them. 825 F. Supp. at 1032, citing *United Electrical, Radio and Machine Workers of America, Local 1139 v. Litton Microwave Cooking Products,* 704 F.2d 393, 397 (8th Cir. 1983).

As the Court stated in *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38, 108 S.Ct. 364, 371 (1987), "the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *See also Enterprise Wheel,* 363 U.S. at 597, 80 S.Ct. at 1361. Here, it is apparent from the face of the Arbitrator's opinion that he blithely ignored his own findings in order to manufacture his preferred outcome.

It is axiomatic that it was not within the Arbitrator's authority to decide "whether he [liked] the terms of [the Agreement] and change them to suit his decision." *Florida Power Corp. v. Int'l Bhd. of Electrical Workers,* 847 F.2d 680, 685 (11th Cir. 1988) (Garza, J. dissenting); *Int'l Union of Oper. Engineers v. Kerr-McGee Refining Corp.,* 618 F.2d 657, 660 (10th Cir. 1980). The Arbitrator's characterization of the award as compensatory, in the complete absence of any evidence of a monetary loss, and his awardance of damages

despite his own finding that punitive damages were not warranted, are irrational and take his award outside the scope of non-reviewable arbitration decisions. Indeed, it is well accepted that an arbitrator "may not shield an 'outlandish disposition of a grievance' from judicial review simply by making the right noises — noises of contract interpretation." *Leed Architectural Products v. United Steelworkers of America,* 916 F.2d 63, 65 (2d Cir. 1990) (quoting *Marine Pollution Serv., Inc.,* 857 F.2d 91, 94 (2d Cir. 1988), and *Ethyl Corp. v. United Steelworkers of America,* 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied,* 475 U.S. 1010, 106 S.Ct. 1184 (1986)). As the Eleventh Circuit properly held, the Arbitrator could not impermissibly award punitive damages simply by recasting them as compensatory. 995 F.2d at 1032.

In sum, the Eleventh Circuit vacated the award based on the Arbitrator's own findings and his gross failure to keep faith with those findings. There is no Supreme Court case law which protects such arbitral excess, and the Union has not offered any authority to support reinstatement of the award. As a result, the Petition should be denied.

CONCLUSION

For the foregoing reasons and on the authorities cited, the Court should decline to grant the Writ of Certiorari to the Eleventh Circuit Court of Appeals because the questions were correctly decided under the relevant federal labor law and the questions do not present any issues that would merit this Court exercising its discretion to review this case.

Respectfully submitted this 6th day of April, 1994.

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